IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5892 of 2004

Mrs.Hasmatbi Bacchubai Sayyed ..Petitioner

V/s

Mr.Kutubiddin B. Sayyed and Ors ...Respondent

Shri Vinay J. Hegde for Petitioner

Shri Dilip Bodake for Respondent nso.1, 3 and 4

CORAM:S.R.SATHE,J.

DATED:20th Feb. 2006

P.C.:-

. Heard finally at the admission stage.

2. Heard both the learned Advocates at length.

3. As plaintiff's application for carrying out amendment in the plaint was rejected by the trial Court, he has filed the present writ petition under Article 227 of the Constitution of India.

4. Plaintiff filed a suit for declaration and injunction. Plaintiff alleged that the suit property is owned only by plaintiff and defendant no.6 and

defendant nos.1 to 5 have no right, title and interest in the same. By virtue of proposed amendment plaintiff wanted to verify the position as to how she and defendant no.6 became the full owner of the suit property. Besides this in the plaint the plaintiff had averred that brother of defendant no.6 viz. Ramjan is absconding for more than 18 years and as such he is presumed to be dead. However, no declaration in that behalf was sought. Hence he sought amendment to that effect.

5. The application was strongly opposed mainly on the ground that it was sought after about 13 years from filing of the suit when the suit came up for hearing. secondly, it was contended that the plaintiff tried to make out a new case.

6. I have carefully gone through the plaint, application for amendment as well as the say of the defendant. There is nothing to indicate that the plaintiff is trying to make out any new or inconsistent case about missing of brother of defendant no.6. Already averments were made. So far as share of the parties are concerned it seems that the plaintiff has tried to make out some modification in the same but ultimately that would not change the fate of the suit. The court is required to determine the shares of the parties not on the basis of statement of the plaintiff or defendant but having

regard to the provisions of law. The proposed amendment is in fact necessary to determine the real controversy between the parties and to avoid multiplicity of the proceedings. Keeping in mind the scope and object of Order 6 Rule 17 of Code of Civil Procedure I do not think that if the application is allowed any prejudice will be caused to the defendant.

7. The order passed by the trial Court is not legal and correct. Hence the petition is allowed. The plaintiff is directed to carry out the amendment within two weeks from today, subject to payment of cost of Rs.1500/- to the present Respondents nos 1, 3 and 4. Defendant is at liberty to file additional written statement as well as additional documents, if necessary, in view of amended plaint. Written statement is to be filed within one month from the amendment.

(S.R.SATHE,J.)